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First Amendment Prospective - The Gag Rule and Free Speech

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FIRST AMENDMENT PROSPECTIVE

THE GAG RULE AND FREE SPEECH

Chicago Council of Lawyers v. Bauer,
371 F.Supp. 689 (N.D. Ill. 1974).

> Freedom of speech and of the press are fundamental liberties guaranteed by the Constitution. They must be zealously preserved, but at the same time must be exercised with an awareness of the potential impact of public statements on other fundamental rights, including the right of a person accused of crime, and of his accusers, to a fair trial by an impartial jury.[1]

The above statement frames the difficult problem of striking the proper balance between the guarantees of free speech of the first amendment and of a fair trial of the sixth amendment. The American Bar Association and the United States District Court for the Northern District of Illinois attempted to harmonize these guarantees when, in 1971, they adopted rules which prohibit judicial personnel from making extra-judicial statements which are reasonably likely to interfere with a fair trial or to otherwise prejudice the due administration of justice.[2] These rules, referred to as the no-comment or gag rules, establish the proposition that the freedoms of the first amendment must be subordinate to the rights of the sixth whenever exercise of the first is reasonably likely to interfere with the guarantees of the sixth.[3]

The constitutionality of the gag rules has recently been upheld in *Chicago Council of Lawyers v. Bauer.*[4] The decision has been appealed to the United States Court of Appeals for the Seventh Circuit.[5] This note will analyze the reasoning of the district court in determining the constitutionality of the gag rules and their limit on free speech, assess the soundness of the court's decision to narrow the old standard defining the limits of free speech, and point out the alternatives available to the Seventh Circuit on appellate review.

Chicago Council of Lawyers v. Bauer

In *Chicago Council of Lawyers v. Bauer,*[6] an association of local lawyers

1. ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, 16 (1968).
2. LOC. CRIM. RULE 1.07 and ABA DISCIPLINARY RULES No. 7-107.
3. *Id.*
4. 371 F. Supp. 689 (N.D. Ill. 1974).
5. Chicago Council of Lawyers v. Bauer, No. 74 C 1305 (7th Cir., filed 1974).
6. Chicago Council of Lawyers v. Bauer, 371 F. Supp. 689 (N.D. Ill. 1974) (hereinafter referred to as *Chicago Council of Lawyes*).

and seven of its attorney members brought an action for declaratory judgment and injunctive relief. They sought a finding that Local Criminal Rule 1.07 for the Northern District of Illinois and Disciplinary Rule 7-107 of the American Bar Association Code of Professional Responsibility were unconstitutional on their face because they were violative of rghts under the first amendment.[7] These gag rules prohibit counsel from releasing any extra-judicial statement (informational or opinionated) in connection with imminent or pending litigation[8] where "there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice."[9]

It should be noted that the attack in *Chicago Council of Lawyers* was made only by defense lawyers, and not prosecutors or law enforcement officials.[10] There are inherent differences in interests and types of statements which may be made by defense counsels. Whereas a prosecutor may release information about a defendant's past criminal record, a defense attorney is more likely to comment on the attitude or techniques of police investigation, merits of the case or judicial temperament.[11] It is unclear whether the district court's opinion reflects this distinction and no intimation is made here as to the constitutionality of the rules, or its standard of measurement, when applied to court personnel other than defense counsel.

The Chicago Council of Lawyers had contended that the gag rules were unconstitutionally overbroad,[12] because they exceeded the minimum restraints necessary to assure a fair and impartial trial.[13] The court, noting that it is fundamental to our system of justice that decisions be induced only by evidence and argument in open court and not by any outside influence,[14] pointed out that the right to a fair trial extends not only to defendants but

7. *Id.* at 690. Plaintiffs had alleged, and the court had assumed "arguendo", that local Rule 8 and the Nov., 1965 Policy Statement issued by the judges of the Federal Courts for the N.D. of Ill. were intended to incorporate the ABA DISCIPLINARY RULES.

8. Loc. Rule 1.07 applies only to criminal litigation. But ABA DR7-107 extends this to include civil cases as well.

9. LOC. CRIM. RULE 1.07(a); ABA DISCIPLINARY RULES No. 7-107(G).

10. Plaintiffs were a group of local lawyers and intervenors were several non-member defense lawyers who sought to be appointed the proper representatives of the class.

11. *E.g., compare* Marshall v. United States, 360 U.S. 310 (1959) (prior convictions for similar offense released to newspaper); Strobel v. California, 343 U.S. 181 (1951) (suppressed confession released by prosecution); *with In re* Dellinger, 461 F.2d 389 (7th Cir. 1972) (defendants made comments on political aspects of the trial and impartiality of the judge).

12. A statute is overbroad when it prohibits conduct in such a way as to "sweep within its proscription conduct that is constitutionally protected." Dandridge v. Williams, 397 U.S. 471 (1970); *See* Zwickler v. Koota, 389 U.S. 241, 249-50 (1967); N.A.A.C.P. v. Button, 371 U.S. 415, 432-33 (1963); Shelton v. Tucker, 364 U.S. 479, 488-89 (1960).

13. 371 F. Supp. at 692.

14. *Id.* at 691, *citing* Patterson v. Colorado, 205 U.S. 454, 462 (1907).

also to the government and, through it, to society.[15] They reviewed the historical background which led to the adoption of the gag rules,[16] and then dealt with the plaintiffs' contentions separately in relation to criminal jury trials,[17] in relation to civil jury trials,[18] and finally in relation to the lack of distinction between these and bench trials.[19]

The Chicago Council of Lawyers had first argued that the rules failed to utilize traditional protective devices in lieu of partially silencing attorneys.[20] A rule which infringes fundamental personal rights cannot stand where there are less burdensome alternatives available.[21] The court noted that continuances, changes of venue, cautionary instructions and sequestration are not preventive, but designed merely to overcome the effects of prejudicial publicity once it has occurred. Furthermore, these techniques, themselves, jeopardize other of defendant's constitutional rights. Continu-

15. *Id. citing* Williams v. Florida, 399 U.S. 78, 82 (1970); North Carolina v. Pearce, 395 U.S. 711, 721 n.18 (1969); United States v. Tijerina, 412 F.2d 661, 666 (10th Cir.), *cert denied*, 396 U.S. 990 (1969); State v. Kavanaugh, 52 N.J. 7, 243 A.2d 225, 231 (1968).

16. The court noted that the gag rule was a direct result of the mandate of the Supreme Court in Sheppard v. Maxwell, 384 U.S. 333 (1961), wherein the Court had declared:

> The courts *must* take such steps by *rule and regulation* that will protect their processes from prejudicial outside interferences. . . . Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only *subject to regulation, but is highly censurable and worthy of disciplinary* measures (emphasis added). 384 U.S.. 333, 363.

In *Sheppard*, the Court reversed the murder conviction of Dr. Sam Sheppard on the basis that by the totality of circumstances the massive publicity, including nonevidentiary statements about the defendant and his actions, prior to and during the trial had been so pervasive that there was a probability that prejudice had resulted and the proceedings were therefore deemed to inherently lack due process. *Id.* at 352. In so holding the Court had said: "The trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulges prejudicial matter." *Id.* at 361. After this decision both the legal and the news community undertook extensive studies on this fair trial—free speech/press issue. *See, e.g.*, ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, ABA PROJECT ON MINIMUM STANDARDS FOR CRIM. JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1968) (hereinafter cited as the REARDON REPORT); COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS FAIR TRIAL" ISSUE (1968) (hereinafter cited as the KAUFMAN REPORT); ASSOCIATION OF THE BAR OF THE CITY OF N.Y., SPECIAL COMMITTEE ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE, FREEDOM OF THE PRESS AND FAIR TRIAL, FINAL REPORT WITH RECOMMENDATIONS (1967) (hereinafter cited as the MEDINA REPORT); AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION SPECIAL COMM. REPORT FREE PRESS AND FAIR TRIAL (1967); Barist, *First Amendment and Regulation of Prejudicial Publicity*, 36 FORDHAM L. REV. 425 (1968); culminating in the adoption of the currently challenged rules.

17. 371 F. Supp. at 692-96.

18. *Id.* at 697.

19. *Id.*

20. *Id.* Traditional protective devices include continuances, changes of venue, cautionary instructions and sequestration. *Id.* at 692 n.5.

21. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972); Kusper v. Pontikes, 94 S. Ct. 303 (1973).

ances and changes of venue conflict with a defendant's right to a speedy trial in the locale in which the crime took place, and in conjunction with cautionary instructions, they cannot negate the effect of prejudicial publicity once it has permeated the proceedings. Sequestration may itself be prejudicial to the defendant through the inconvenience and annoyance it causes jurors. Since these remedial measures do not prevent the prejudice at its inception, the court found the traditional techniques clearly inadequate.[22]

While this reasoning is valid in terms of balancing the rights of a defendant against overcoming the effects of defendant-prejudicial statements made by the prosecution, it is not so clearly valid when the prejudice is directed toward the prosecution, as it would be if made by a defense attorney. It is unclear whether the state has a constitutional right to a speedy trial, in the locale in which the crime has been committed. Furthermore, since a jury is rarely informed why they are being sequestered, if, as the court believes, their prejudice will be directed against the defendant, it can certainly do no harm to the prosecutor to seek sequestration to guard against defense-made prejudicial statements.

But the force of any distinction between the effect curative techniques may have on differing rights of defendants and prosecutors may be somewhat diminished if, as seems only fair in a system of equal justice, those rights are the same. By analogy the court seems to imply just that in answer to plaintiffs' second contention, that the rules are overbroad in failing to distinguish between comments favorable to the criminal defendant and those which are hostile.[23] The court noted that incidents of prejudicial publicity have generally been due to prosecutorial excesses.[24] But this does not mean that statements made by defense counsels, though favorable to a defendant, may not be prejudicial to the prosecution.[25] In fact the recent increase in defense-characterized "political trials" would likely make such incidents more common. Allowing such prejudicial material, even though only prejudicial to the prosecution, to infect the courtroom is no more commensurate with the ideal that conclusions should only be based on evidence adduced in open court than allowing prosecutors to generate publicity prejudicial to the accused. As the court pointed out in answer to plaintiffs' second contention: "The adoption of the one-sided approach urged by the plaintiffs would ignore the correlative interest of society in a fair trial. Any limitation of prejudicial comment should apply to any attorney (prosecution or defense) bent on securing improper advantage."[26]

22. 371 F. Supp. at 692.
23. *Id.*
24. REARDON REPORT, *supra* note 24 at 37, 42-43.
25. *See* MEDINA REPORT, *supra* note 16 at 43-55; REARDON REPORT, *supra* note 16 at 42-43, 175; Bloeth v. Denno, 313 F.2d 364, 378-79 (2nd Cir.) (dissent), *cert. denied*, 372 U.S. 978 (1963); Sheppard v. Maxwell, 384 U.S. at 361.
26. Chicago Council of Lawyers v. Bauer, 371 F. Supp. 689, 692 (N.D. Ill. 1974),

Plaintiffs' third contention was that the gag rules constituted a prior restraint of first amendment rights and must be judged accordingly.[27] While the Constitution guarantees the rights of free speech and press,[28] these rights have never been held to be absolute. There are instances where the first amendment's ban on prior restraints may be over-ridden—"where disclosure will surely result in direct, immediate and irreparable damage."[29] Similarly, there are certain kinds of speech which have generally not been considered to be constitutionally protected.[30] In answer to plaintiffs' contention, the court said that the gag rules were not a prior restraint because they did not impose a blanket prohibition on all speech irrespective of content. Rather, they sought only to punish speech from which prejudice was reasonably likely to result. They impose a responsibility on those who violate them as do the laws on slander, libel and obscenity.[31]

In so holding, the court distinguished *Organization for a Better Austin v. Keefe*,[32] where the Supreme Court ruled unconstitutional an injunction prohibiting the organization from distributing leaflets which had attacked Keefe's business practices. They held that injunction to be a prior restraint because it operated "not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000."[33] It seems likely, therefore, that the court in *Chicago Council of Lawyers* did not mean that a rule which subjects one to disciplinary action for speaking is not a prior restraint, rather that the gag rule was sufficiently narrow to prohibit speech that, in itself, is not constitutionally protected from being restrained.

Whether statements which are merely "reasonably likely" to interfere with a fair trial or otherwise prejudice the due administration of justice includes constitutionally protected speech was the issue raised by the plaintiffs' fourth and final attack on the breadth of the gag rules. The Chicago Council of Lawyers had argued that the rules were overbroad because they were not based upon a "clear and present danger" of prejudicial effect, but rather on the lesser standard of "reasonable likelihood".[34] In support

citing State v. VanDuyne, 43 N.J. 369, 204 A.2d 41, *cert. denied*, 380 U.S. 987 (1969); State v. Kavanaugh, 52 N.J. 7, 243 A.2d 225 (1968).

27. 371 F. Supp. at 693.

28. U.S. CONST. amend. I.

29. N.Y. Times v. United States, 403 U.S. 713, 730 (Stewert, J., concurring). *See* Dennis v. United States, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring); Froewerk v. United States, 249 U.S. 204, 206 (1919); Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

30. Garrison v. Louisiana, 379 U.S. 64 (1969) (libel and slander); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Cox v. Louisiana, 379 U.S. 559 (1969) (fighting words); *see generally* Beauharnais v. Illinois, 343 U.S. 250 (1952).

31. 371 F. Supp. at 693.

32. 402 U.S. 415 (1971).

33. *Id.* at 418-419.

34. 371 F. Supp. at 693.

of this proposition the Chicago Council of Lawyers cited four cases in which the United States Supreme Court reversed contempt convictions for statements which allegedly showed disrespect to the judiciary and interfered with the fair administration of justice.[35] In each of those cases the Supreme Court forbade punishment absent a showing that the utterances created a clear and present danger to the administration of justice.[36] But the court in *Chicago Council of Lawyers* felt that these cases were not controlling. The contempt cases were distinguished on three grounds: (1) the cases and their use of the clear and present danger standard were said to apply only to the first amendment rights of the *press* and *private citizens* where *no judicial proceeding* is pending, not to *lawyers* participating in *ongoing litigation*;[37] (2) they were concerned with defining the permissible scope of the contempt power, "a common law concept of the most general and undefined nature," not with the violation of a narrowly drawn court rule which seeks to accommodate competing constitutional interests;[38] and (3) they dealt with hostile remarks directed at judges or the general administration of justice, and not with remarks intended to influence a jury in a pending trial.[39]

35. Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947); Wood v. Georgia, 370 U.S. 375 (1962).

36. 314 U.S. at 263, 271; 328 U.S. at 337, 348-50; 331 U.S. at 376, 378; 370 U.S. at 384-85, 395.

37. 371 F. Supp. at 693. This seems to imply that lawyers participating in a trial are different from the press or private citizens who may be concerned with the outcome of the trial, and that this difference is substantial enough to warrant requiring the lawyer to partially forego a significant and fundamental constitutional right.

38. *Id.* But the distinction is irrelevant. Constitutional interpretation is exclusively a function of the judiciary. Marbury v. Madison, 5 U.S. 137 (1803). In terms of what standard the Constitution requires before speech can be punished, there is no difference whether the standard is set by the Legislature or by case law. The court in *Bauer* supports their distinction by pointing out that "the Supreme Court has made it abundantly clear that review of contempt convictions will differ drastically from review of statutory violations where the need for regulation has been buttressed by prior legislative deliberations." Chicago Council of Lawyers v. Bauer, 371 F. Supp. 689, 693 (N.D. Ill. 1974), *quoting* Bridges v. California, 314 U.S. at 260-61; Wood v. Georgia, 370 U.S. at 386. But there the Court was referring to review of the evidence as to the source from which comes the danger that a Government body is entitled to protect against, in this case prejudice, and not the standard of content which amounts to that danger. Because of the possibility of judicial abuse of the "freehand of contempt" the Court was concerned with what words interfered with the administration of justice so as to justify contempt not the standard by which those words would be measured and prevented.

39. To support this distinction, the court cited Wood v. Georgia, 370 U.S. 375 (1962) where the Supreme Court had said:

> It is important to emphasize that this case does not represent a situation where an individual is on trial . . . . Neither *Bridges, Pennekamp* nor *Harney* involved a trial by jury . . . and of course the limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation. *Id.* at 389-90.

But there again the Court was talking about content—the actual words used and whether they might influence a judge or a jury. They were not referring to effect—the standard by which unspecific words are to be measured—in determining whether they are consti-

The opinion then relies on the dissent in *In re Sawyer*,[40] dealing with a similar factual situation, to raise doubt as to the viability of the clear and present danger standard as a measure of protected speech,[41] and a Tenth Circuit Court of Appeals decision in *United States v. Tijerina*,[42] to hold that such is not the required standard to be used in measuring the constitutionality of court rules proscribing the dissemination of prejudicial remarks by active trial counsel.[43] Having rejected the "clear and present danger" standard, the court balanced the right of trial counsel to comment on pending criminal proceedings against the right of individual defendants and society to a fair and impartial trial and found that the contexual interests in free speech were "neither compelling nor evident."[44] The court noted that the gag rules neither prohibit all speech nor impair the public's right to know. They asserted that participating attorneys do not necessarily have a proper interest in publicly discussing matters not of record that could affect the outcome of the litigation, and pointed out that the Supreme Court has held that the right to a fair trial takes precedence over other constitutional guarantees.[45] Logical practicality would indicate that the reasonable likelihood

tutionally protected. What specific words might constitute a clear and present danger of prejudicing a judge or a jury relate to contempt, and is different from how general words are to be measured to determine whether they fall within unprotected speech which relates to effect. Furthermore, generally speaking it seems reasonable that any statement a defense attorney might make that could be prejudiced would more than likely be directed at a judge or the administration of justice, as in Bridges and its progeny, than at the facts in evidence or of facts which could not be used as evidence. *See* REARDON REPORT, *supra* note 16 at 20-47, *but see* Bloeth v. Dueno, 313 F.2d 364 (2nd Cir. 1963) (dissenting opinion).

40. 360 U.S. 622 (1959) where during the pendency of a criminal case one of the trial counsel, Mrs. Sawyer, made a public speech construed by the Supreme Court of Hawaii as an attack on the fairness and impartiality of the Federal District Court Judge presiding over the trial. In a 5-4 decision, the U.S. Supreme Court reversed Mrs. Sawyer's conviction and suspension for gross misconduct on the grounds that the finding upon which the suspension rested were not supported by the evidence. The majority had judged the words not to create a clear and present danger of prejudice. *Id.* at 662. But the dissent emphasized that the First Amendment rights of active trial counsel were significantly less immune from restrictions that those of others who were not officers of the court hearing the case. *Id.* at 668 (Frankfurter, J., dissenting). The dissent went on to say: "Even in the absence of the '*substantial likelihood*' that what was said at a public gathering would reach the judge or jury, conduct of the kind found here cannot be deemed to be protected by the Constitution." *Id.* at 622, 668 (emphasis added). It might be well to point out that Frankfurter's use of the phrase "substantial likelihood" referred to whether the words would be disseminated, not to whether the content of the words were likely to be prejudicial.

41. 371 F. Supp. at 695.

42. 412 F.2d 661, *cert. denied*, 396 U.S. 990 (1969). The court upheld a contempt conviction for violating an order prohibiting extra-judicial comments by all attorneys and defendants despite defendants' assertion that the order was invalid since it was not based upon a "clear and present danger" standard. The court said that a "reasonable likelihood" standard sufficed. *Id.* at 666.

43. 371 F. Supp. at 696.

44. *Id.*

45. *Id., citing* Estes v. Texas, 381 U.S. 532, 540-41 (1965). *Contra*, Thomas v. Collins, 323 U.S. 516, 531 (1944); Kovacs v. Cooper, 336 U.S. 77, 95-6 (1948) (Frank-

standard is mandatory. The court said: "If convictions are to be overturned on a showing that publicity probably affected the outcome, attempts by court rule to forestall such prejudice must be judged by the same standard."[46]

Finding no merit to any of the four arguments of overbreadth in relation to criminal jury trials the court extended the reasoning to include civil jury and bench trials as well. Since "the very purpose of a court system is to adjudicate controversies, *both criminal and civil*, in the calmness and solemnity of the courtroom according to legal procedures,"[47] and since extrajudicial statements which may be prejudicial will be equally so whether directed to a jury in a criminal or a civil case, many of the reasons which establish the constitutionality of the gag rules as applied to criminal jury trials also support their constitutionality as applied to civil jury trials.[48] Similarly, judges like jurors, are only human, so that any effect of prejudice an extrajudicial statement may have upon a jury could equally affect the attitude of a judge in a bench trial.[49]

LIMITS ON THE SCOPE OF FREE SPEECH

The decision of the court in *Chicago Council of Lawyers* turns on the rejection of the "clear and present danger" test and the adoption of a balancing test to determine the constitutionality of these rules that infringe on first amendment rights. The court's ultimate justification was that "'the Supreme Court has never said that a clear and present danger to the right of a fair trial *must exist* before a trial court can forbid extra judicial statements about the trial."[50] But it should be noted that the Supreme Court has

further, J., concurring); Barnes, *A Changing Attitude Toward Trial by Newspaper*, 16 OKLA. L. REV. 337 (1963), where it is said that "freedom of speech and press and the right to an impartial trial are in reality co-extensive, and each necessary for the existence of the other," such that the distinction between the two is artificial. *Id.* at 337-383; United States v. Robel, 389 U.S. 258 (1967), where the Court noted that none of the Bill of Rights provisions are more important or substantial than any other, each being necessary to ensure a free society. *Id.* at 268 n.20; RIGHTS OF FAIR TRIAL ABA INFO. MANUAL (1969) which points out that the "United States Supreme Court has refused to assert the primacy of any part of the Bill of Rights over any other part, but instead has consistently treated them as equal." *Id.* at 83.

46. Chicago Council of Lawyers v. Bauer, 371 F. Supp. 689, 696-97 (N.D. Ill. 1974).

47. *Id., quoting* Cox v. Louisiana, 379 U.S. 559 (1965) (Black, J., dissenting).

48. 371 F. Supp. at 697.

49. *Id., citing* Cox v. Louisiana, 379 U.S. 559, 565 (1965). *Accord*, Bridges v. California, 314 U.S. 252, 299 (1941) (dissenting opinion). *Contra*, Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). Certainly the different standards for jury and bench trials applied for appellate reversals of convictions when prejudicial evidence has been admitted at trial support the idea that judges are more immune to prejudicial affects and more likely to judge a case solely on proper evidence but the recent experiences in the "Chicago 7 Conspiracy Trial", *In re* Dellinger, 461 F.2d 389 (7th Cir. 1972), is a clear example that the modern view that "judges are only human" might be of greater validity.

50. Chicago Council of Lawyer v. Bauer, 371 F. Supp. 689, 697 (N.D. Ill. 1974).

also never said that a clear and present danger *need not exist* before a court can take such action.[51] Therefore, to effectively analyze the reasoning of the court, and its value, it is necessary to discuss the viability of the "danger standard" and the alternative approaches the courts may use when measuring the extent of the freedom of speech.

The fundamental issue involved in measuring the first amendment's scope of freedom of speech is the determination of the point at which the rights of the individual stop and the rights of organized society to protect itself and its institutions begins. A democratic society requires that its people be given the information necessary to make an intelligent evaluation of competing ideas. Since first enunciated in *Schenck v. United States*,[53] where it was used as a rule of evidence to limit the time and place for exercise of freedom of speech, not to limit content,[54] the clear and present danger test is the test the courts have used to measure when necessary information could be supressed for the sake of a greater common good. The early applications of the test were to determine the validity of restrictions on acts of pure speech, but by 1947, the danger doctrine was expanded to include other related first amendment problems.[55] Subsequent resistence to this omnibus use of the test[56] culminated in its implied rejection in *Dennis v. United*

51. If they had, the court would not have had to use this inverse reasoning to justify rejection of the standard. While the Supreme Court refused certiorari in United States v. Tijerina, 412 F.2d 661 (2nd Cir. 1969), *cert. denied*, 396 U.S. 990 (1969), this cannot be meant to imply assent to what was said there.

52. Comment, *Clear and Present Danger Standards: Its Present Viability*, 6 U. RICH. L. REV. 93 (1971).

53. 249 U.S. 47 (1919).

54. The Court said "We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done." 249 U.S. 47, 52. The clear and present danger test was refined in Holmes' dissent in Abrams v. United States, 250 U.S. 616 (1919), to limit speech only where the danger the speech provoked was imminent. Then in Brandeis' concurring opinion in Witney v. California, 274 U.S. 357 (1927), it was raised to a constitutional level as a means to determine validity of statutory challenges to freedom of expression. The majority of the Court finally accepted the test in Herndon v. Lowry, 301 U.S. 242 (1937), where it was used to reverse a conviction for violating a Georgia statute making it a crime to incite insurrection. The Court found the statute invalid as applied, feeling that the defendant's conduct did not amount to a clear and present danger of bringing about the substantive evil that the statute was designed to prevent. *Id.* at 263.

55. *E.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940) (picketing in labor disputes); Cantwell v. Connecticut, 310 U.S. 296 (1940) (disturbing the peace by playing record attacking the church); Thomas v. Collins, 323 U.S. 516 (1945) (registration of labor organizers); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compulsory flag salute for public school children). *See* U. RICH. L. REV., *supra* note 52 at 100 n.47.

56. *See* American Communications Assoc. v. Douds, 339 U.S. 382 (1952), involving validity of a provision of the Taft-Hartley Act, 29 U.S.C. § 159(h) (1952) (repealed 1959) which denied services of the NLRB to any union official who refused to sign a "no communist connections" affidavit, where Chief Justice Vinson expressed dissatisfaction with any attempt to mechanically apply the test in every case involving First Amendment freedoms. Instead he suggested that the Court adopt a new approach

States.[57] Chief Justice Vinson, joined by Justices Reed, Burton and Minton, said that use of the danger test would prevent governmental action until it was too late.[58] The opinion urged the adoption of a modified version of the test: "In each case (the court) must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[59]

The Court's desire to avoid the danger test becomes evident when it is noted that between 1951 and 1971 the test was found specifically unsuitable in dealing with free speech and libel[60] or obscenity,[61] and was in fact used in only one majority opinion.[62] With these exceptions, the Court has replaced the danger test with the logical extension of the modified version urged in *Dennis*:[63] a balancing approach, at first referred to as "ad hoc balancing"[64]

whereby the conflicting interests are balanced. *Id.* at 394. *Compare* Terminiello v. Chicago, 337 U.S. 1 (1947) *with* Feiner v. New York, 340 U.S. 315 (1951). *See generally* U. RICH. L. REV., *supra* note 52 at 104-09; Strong, *Fifty Years of Clear and Present Danger*, 1969 SUP. CT. REV. 31. *See* BERNS, FREEDOM VIRTUE AND THE FIRST AMENDMENT 72 (1967); Krislov, *From Ginzburg to Ginsberg; The Unhurried Children's Hour in Obscenity Litigation*, 1968 SUP. CT. REV. 153, 178-79; McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229, 1236 (1965).

57. 341 U.S. 494 (1951).

58. Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack it must follow that no subordinate value can be protected. If then, this interest may be protected the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danager' of the utterance bringing about the evil within the power of Congress to punish. Obviously, the words cannot mean that before the Government may act it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. . . . The damage which (attempted overthrows) create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. . . . We must therefore reject the contention that success or probability of success is the criterion. 341 U.S. at 509-10.

59. United States v. Dennis, 183 F.2d 201, 212 (2nd Cir. 1950). It should be noted that determining the point at which freedom of expression ceases to be constitutionally protected through the probability or improbability of certain conduct occurring is not the same as determining at which point that conduct imminently threatens the existence of organized society. And once the gravity of the evil is discounted by the probability one is still left with the need to balance to determine whether the invasion is justified. Such a technique emasculates the danger test as a means of determining a reference point for the scope of free speech. United States v. Dennis, 341 U.S. 494, 581-92 (1951) (Douglas, J., dissenting).

60. Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); *see* New York Times v. Sullivan, 376 US. 254 (1964).

61. Roth v. United States, 354 U.S. 476, 486 (1957).

62. Wood v. Georgia, 370 U.S. 375 (1962), where the Court used the clear and present danger test to reverse a contempt conviction for statements allegedly made to interefere with the due administration of justice. *Id.* at 395.

63. Discounting the evil by its probable occurrence still requires a further step to determine whether the gravity justifies the interference. This further step is a balancing to determining the weight of the evil vis-a-vis the interference. *See* KRISLOV, THE SUPREME COURT AND POLITICAL FREEDOM, 121 (1968); KALVEN, THE NEGRO AND THE FIRST AMENDMENT, 86, 121 (Phoenix ed. 1966).

64. Ad hoc balancing is the technique whereby the interest in prohibiting the con-

and more recently called "definitional balancing,"[65] which is the approach taken by the court in *Chicago Council of Lawyers*.

Many reasons have been put forth for the Court's abandonment of the clear and present danger test.[66] In *Dennis*, specifically, the socio-political and economic complexity of the communist threat during the McCarthy era made the test unsuitable when dealing with the conduct presented to the Court.[67] More generally, however, its mechanical application in a wide variety of cases completely unrelated to situations envisioned by its authors seems to have too severely restricted the latitude of approaches necessary when dealing with various differing factual problems.[68] Certainly a balancing technique seems more applicable when dealing with the multiple possibilities raised by speech-related conduct or speech-plus.

ALTERNATIVES AVAILABLE TO THE SEVENTH CIRCUIT

Definitional balancing allows a court greater opportunity to ground its decision on the specific factual circumstances involved in each case. It permits a court to weigh the various interests supported by the specific conduct, and the effect upon those interests of a ruling on that conduct, in determining its result. But while balancing gives preference to the latitude of the court's opinion, it is at the expense of creating uncertainty as to the extent of the first amendment guarantee.

Reasonable Likelihood of Prejudice

The reasonable likelihood standard rests on such a balancing approach and presupposes the desirability of the sixth amendment over the first in the context of trial publicity.[69] The reasonable likelihood standard has been upheld in decisions by the United States Court of Appeals for the Second

duct is weighed against the interest of the person in pursuing such conduct. *See* Morris & Powe, *Constitutional and Statutory Rights to Open Housing*, 44 WASH. L. REV. 1, 28-46 (1968); Kauper, *Political Freedom*, 58 MICH. L. REV. 619 (1960); Karst, *Legislative Facts in Constitutional Litigation*, 1960 S. CT. REV. 75; Karst, *The First Amendment and Harry Kalven*, 13 U.C.L.A. L. REV. 1 (1965).

65. Definitional balancing requires the court to define such concepts as speech, abridge and freedom and to measure the extent to which the facts meet these definitions. In light of this, the court then weighs the respective interests involved. *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912-16 (1963); Frantz, *The First Amendment in Balance*, 71 YALE L.J. 1424, 1433-45 (1962); Nimmer, *The Right to Speak from "Times" to "Times": First Amendment Theory Applied to Libel and Misapplied to Privacy*, CALIF. L. REV. 935, 935-67 (1968).

66. *See* Corwin, *Bowing Out 'Clear and Present Danger'*, 27 NOTRE DAME LAW. 325 (1952); Emerson, *supra* note 85; FREUNEL, THE SUPREME COURT OF THE UNITED STATES (1961); Kalven, *The Central Meaning of the First Amendment*, 1964 S. CT. REV. 191; KRISLOV, THE SUPREME COURT AND POLITICAL FREEDOM (1968).

67. Comment, U. RICH. L. REV., *supra* note 52 at 102.

68. *Id.* at 102 and n.93.

69. *See supra* notes 53-57 and accompanying text.

Circuit[70] and by the appellate court of California.[71] The Second Circuit decision relied on the Supreme Court's mandate in *Sheppard v. Maxwell*[72] for rules to limit publicity, and on the belief that a fair trial takes preference over free speech.[73] The California appellate court based its ruling on the belief that the clear and present danger test requires a judge to "palm off guesswork as finding" and "'puts a premium on hypocritical adherence to an abstract formula."[74] They found that reasonable likelihood was more "honest" because the entire prejudicial publicity problem is one of "contingencies rather than realities" and such a test permits the courts to consider "openly and frankly the many future variants which collectively may amount to a reasonable likelihood, but, by their very contingent nature, can never amount to a clear and present danger."[75]

This reasoning, and that of the district court in *Chicago Council of Lawyers*, is itself speculative. Neither the first nor sixth amendment guarantees can effectively exist without the complimentary mandate and result of the other. A fair trial insures that the freedom to speak will not be arbitrarily taken away, and conversely free speech insures that a trial will be open and fair. A preference for either constitutional guarantee jeopardizes the other, and should at least depend on the social and political importance of the speech as well as the degree and imminence of prejudice to a fair trial. Furthermore, failure to specifically define the scope of protection of the first amendment subjects the lawfulness of its exercise to the arbitrary views of a particular court whose determination of probability of prejudice is a finding of fact. Such a danger was impliedly recognized by the California court when they said that "in the hands of a conscientious judge the 'reasonable likelihood' test will not be abused."[76]

Clear and Present Danger of Prejudice

A more definitive and strict approach to the scope of free speech limits the potential for abuse of standards. If applied to problems strictly of speech, and not speech-plus, such an approach will not restrict a court's lati-

70. United States v. Tijerina, 412 F.2d 661 (2nd Cir.), *cert. denied*, 396 U.S. 990 (1969).

71. Busch v. Superior Court, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973).

72. 384 U.S. 333 (1961); *see supra*, note 16.

73. United States v. Tijerina, 412 F.2d 661, 667 (2nd Cir.), *cert. denied*, 396 U.S. 990 (1969). To support the preference of the 6th Amendment, over the 1st, the court cites Estes v. Texas, 381 U.S. 532 (1965), where plaintiff's conviction for fraud was reversed because of the potential prejudice due to the publicity surrounding the case, including the fact that the trial itself was televised. During the course of its opinion the Supreme Court said: "We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained *at all costs*." *Id.* at 540 (emphasis added).

74. Busch v. Superior Court, 30 Cal. App. 138, 106 Cal. Rptr. 225, 242 (1973).

75. *Id.*

76. *Id.*

tude in a factual context. Despite the criticisms of commentators and those noted above, the clear and present danger test may be useful where isolated acts of individuals involving pure speech tend to threaten interests which government is duty bound to protect. This strict approach to first amendment problems has been applied where pure speech was sought to be suppressed. As recently as 1969, the Supreme Court, without using the words "clear and present danger", raised their spectre when, in *Brandenburg v. Ohio*,[77] the Court said: "The guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action *and* is *likely* to incite or produce such action."[78]

The Seventh Circuit has used these same words in holding unconstitutional a court order imposing a blanket restriction on extra-judicial comments by lawyers in a pending case.[79] In *In re Oliver*[80] the court, reversing a disciplinary judgment against a lawyer who had violated such an order, said: "Before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is a *serious and imminent threat* to the administration of justice."[81] *Oliver* dealt with an order during the pendency of a civil jury trial, and the majority opinion noted that there was support for the "reasonable likelihood" standard when dealing with criminal jury trials.[82] But the court in *Chicago Council of Lawyers* held the reasonable likelihood standard constitutional in either civil or criminal trials.[83]

In *Chase v. Robson*[84] the Seventh Circuit was confronted with a blanket order restricting comment during a criminal trial, and specifically refused to rule on whether the clear and present danger (serious and imminent threat) or the reasonable likelihood standard was the required test.[85] In *Chase*, like *Oliver*, the order was overbroad because it failed to distinguish between speech that would not have a prejudicial effect on the fair administration of justice and speech that would have such prejudicial effect.[86] Therefore neither case can be cited as requiring either standard, and the appellate court need not be bound by their implied acceptance of the clear and present danger standard.

77. 395 U.S. 444 (1969).
78. *Id.* at 447.
79. *In re* Oliver, 452 F.2d 111 (7th Cir. 1971); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970).
80. 452 F.2d 111 (7th Cir. 1971).
81. *Id.* at 114, *citing* Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970).
82. *In re* Oliver, 452 F.2d 111, 114 (7th Cir. 1971).
83. *Supra* note 49.
84. 435 F.2d 1059 (7th Cir. 1970).
85. *Id.* at 1062. They mentioned and applied both tests.
86. *Id., citing* Zwickler v. Koota, 389 U.S. 241 (1967) and U.S. v. Robel, 389 U.S. 258 (1967).

Knowledge or Reckless Disregard of Prejudice

Even more strict than clear and present danger is an approach which considers the first amendment absolute protection except where, by definition, the speech itself is an evil to be prevented. In dealing with pure speech, the content of which might be beyond the protection of the Constitution because it is characterized as either libelous or obscene, the Supreme Court has been reluctant to allow sanctions to be imposed where the speech has serious "political value."[87] As pointed out earlier, defense attorney statements also may have serious political value as they are often statements concerning the quality of police investigation and judicial conduct. Because of the public's right and need to know, such a comment on a public institution rises to a different constitutional level than a comment intended solely to influence a jury's determination of the facts of a case. In dealing with restrictions on speech that is libelous, the Court has said that where comment is about public figures and matters of public concern restrictions can only be imposed where there is "knowledge or reckless disregard" of falsity.[88] Since defense made statements are likewise often on matters of public concern, by analogy perhaps, the test that should be applied would prohibit extra-judicial comment only where it is made with "knowledge of its prejudicial effect or reckless disregard that such is bound to occur."

The "knowledge or reckless disregard" concept was enunciated in *New York Times v. Sullivan* where the Court used it to limit the extent to which state laws against defamation could be applied to media defamation. Its applicability to the gag rule situation rests on the similarities that both deal with acts of pure speech on matters of public concern. But the Supreme Court decision in *Gertz v. Welch*[89] raises a caveat as to the applicability of the *Times* standard to the gag rule situation. In a 5-4 decision, the Court reversed a judgment against a noted defense attorney who alleged that he had been libeled by a newspaper article about a trial in which he was engaged. The Court refused to extend the *Times* standard to media defamation of private persons merely because an issue of general or public concern was involved. Rejecting an ad hoc balancing technique and applying a definitional balancing approach, the Court said that to make such an extension would abridge to an unacceptable degree the legitimate state interest in compensating private individuals for injury to reputation and would occasion the

87. In the obscenity cases the Court has refused to permit literature to be suppressed, and considered obscene, when it has "serious literary, artistic, *political* or scientific value." Miller v. California, 413 U.S. 15, 24 (1973). In the media defamation cases the Court has noted that the social and *political* importance of comment on matters of public concern is so strong as to require a special showing of "malice" before a judgment for libel can be rendered against the published. New York Times v. Sullivan, 376 U.S. 254, 279-83 (1964).

88. New York Times v. Sullivan, 376 U.S. 254, 279-83 (1964).

89. Gertz v. Welch, 94 S. Ct. 2997 (1974).

difficulty of forcing the court to decide on an "ad hoc" basis which publications address issues of public interest.[90] While the "knowledge or reckless disregard of danger" test is applicable to pure speech on matters of public concern, it may not be applicable where the content of the speech is directed toward private personalities. But although police investigaters may be private persons, prosecutors and judges are elected or appointed officials and any comment on their actions may fall within the *Times*-type protection.

CONCLUSION

In reviewing the decision in *Chicago Council of Lawyers v. Bauer*, the Seventh Circuit will have to address itself to the constitutionality of the "reasonable likelihood" standard. The problem of media pervasiveness and its effects upon the right to a fair trial is substantial, and necessitates some accommodation between the first and sixth amendment guarantees. A lawyer engaged in ongoing litigation is an advocate, but he is also an officer of the court and responsible for the efficacy of its processes. These factors weighed heavily in the reasoning of the district court.

If the appellate court agrees with those conclusions which led to the upholding of the gag rules the problem of prejudicial publicity may be solved. But the potential viability of the first amendment will be severely threatened. To prohibit speech merely because it is reasonably likely to bring about an evil is to prohibit all but innocuous speech.[91] A society that suppresses thought whenever that thought is reasonably likely to be effective will eventually stagnate because of its own fear of change. Over-ruling the decision in *Chicago Council of Lawyers* by adopting the "clear and present danger" or "knowledge of evil" test would not have this result. If either the "danger" or the "knowledge" test is used, they will prevent comment which would interfere with the due administration of justice as well as the present gag rule test does: a statement which would prejudice the outcome of a case would fall within any of the above restrictions. But the use of either of these other two tests would have the further effect of less drastically limiting the rights of free speech. The desirable result could be accomplished without the undesirable interference with the scope of the first amendment.

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90. *Id.* at 3004.

91. *See* United States v. Dennis, 341 U.S. 494, 581-92 (1951) (Douglas, J., dissenting).